BRIEF FOR THE PETITIONERS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 224

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT RADIO, INC., *Petitioners,*

v.

FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion and order of the Public Utilities Commission (R. 114-122) appealed by respondents to the United States District Court for the District of Columbia is reported in 81 P.U.R. (N.S.) 122. The opinion of the District Court (R. 2-3) dismissing the original petition of appeal is unreported. The opinion of the United States Court of Appeals for the District of Columbia reversing the District Court (R. 124-131) is reported in U.S. App. D.C. and 191 F. 2d 450.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on June 1, 1951 (R. 132), and a petition for a rehearing was denied on July 6, 1951 (R. 167). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1) and D.C. Code, Sec. 43-705 (1940 ed.).

QUESTIONS PRESENTED

(1) Whether any private rights of respondents were invaded by the Commission's order dismissing its own investigation limited to questions of public convenience, comfort and safety.

(2) Whether the public has a constitutional right to utilize the services of a private common carrier or whether such rights as they may have exist only by virtue of existing statutes.

(3) Whether the Commission erred as a matter of law: (a) in failing to find that radio reception on Capital Transit vehicles constituted unreasonable service; (b) in finding such reception not inconsistent with public convenience; and (c) in failing to stop such reception.

(4) Whether the reception of radio programs on the vehicles of a private carrier, operating under governmental authority and subject to governmental regulation, is "governmental action" within the meaning of the Fifth Amendment to the Constitution.

(5) Whether a minority of passengers objecting to radio broadcasts on streetcars and buses are deprived of liberty without due process of law under the Fifth Amendment when, after hearing, the Public Utilities

Commission, upon an investigation initiated by it, finds on the basis of substantial evidence of record that such radio reception is not contrary to the public convenience, comfort and safety, but rather improves conditions under which the public rides, and then dismisses its own investigation on those subjects.

(6) Whether the Government is required by the Fifth Amendment to restrain communication with public conveyances if some passengers object or whether, instead, the liberties protected by the Fifth Amendment are relative and subject to the adjustment of competing private interests for the benefit of the general public by the legislative and executive branches of the Government acting in accordance with established processes of law.

(7) Whether radio communication of news, weather reports and other announcements that are important to the convenience and safety of the public are protected by the First Amendment of the Constitution only if commercial advertising messages are not included or whether such commercial messages are protected by the First Amendment when their elimination by Government would terminate the dissemination of constitutionally protected information to the public.

(8) Whether the court may consider and weigh matters outside the record before the Commission and the court, find ultimate facts different than the Commission found, reach contrary conclusions, and then require the Commission to proceed in accordance therewith.

STATUTES INVOLVED

The pertinent constitutional provisions, statutes, and rules are printed in the appendix to this brief.

STATEMENT OF FACTS

In 1948, Capital Transit Company (Transit) and Washington Transit Radio, Inc. (Radio) entered into a contract under which Radio installed and maintained radio receiving equipment in a substantial number of Transit's street cars and buses (R. 34-36, 102-110). A number of months after the institution of this radio service in Transit's vehicles, the Public Utilities Commission of the District of Columbia (Commission) initiated an investigation on its own motion, by giving the notice required by D.C. Code, Sec. 43-415 (1940 ed.) (R. 28). The Commission stated that the purpose of this proceeding was to determine "whether or not the installation and use of radio receivers on the street cars and buses of Capital Transit Company is consistent with the public convenience, comfort and safety . . ." (R. 28). The Commission's investigation was not initiated on the complaint of the Respondents, but they were subsequently allowed to intervene in that investigation.

The record of proceedings before the Commission shows that Transit receives revenue in return for granting to Radio the privilege of installing receivers in its vehicles and that this revenue helps Transit to meet its operating costs (R. 35-37, 107-108). There were installed, at the time of the investigation, 212 radio sets out of a contemplated 1500 installations (R. 37, 116). The receivers are tuned to station WWDC-FM, which transmits programs of selected music, newscasts, weather and time reports, and other public

service announcements important to the convenience and safety of the public (R. 38, 75, 86). Interspersed with these items are short commercial announcements which are limited by contract to sixty seconds duration, not to exceed a total of six minutes in any hour (R. 106, 140), but which actually do not exceed thirty-five seconds in duration (R. 141).

The radio signals are regularly checked and kept at a low level for comfortable listening (R. 96-100). Both subjective and objective tests show that these signals do not hinder or prevent normal communication on streetcars and buses (R. 31, 33, 76, 91), and it is not possible to measure acoustically on those vehicles any difference in the sound level which has been contributed by radio reception (R. 91, 113). The record shows (R. 91-93) and the Commission found (R. 119-120) that the hearing of Transit radio programs "is a matter of the working of the mind" and that "a person can differentiate between sounds or can get used to a sound and put it out of his mind." This fact was also stated by one of the only two Transit rider witnesses who testified before the Commission in opposition to the broadcasts (Transcript of original proceedings before the Commission, pp. 495-499):

> "I think I agree with the psychiatrist and the engineer here who said, 'you can shut off your mind to what you don't want to hear,' and therefore, I think most people shut off their minds to commercials."

The Commission found that the Federation of Citizens Associations, the North Washington Council, representing twenty-two different associations, and many other citizens' associations, as well as associations of Federal employees and businessmen, appeared before

the Commission in support of Transit radio; there were few such organized public associations opposed (R. 117).

Determinations of the public preference for radio programs in Transit's vehicles were twice made by trained investigators under recognized scientific random sampling methods (R. 62-71). The first of these surveys was made in April, 1949 (R. 66), prior to the Commission's commencement of its investigation of such programs in July of the same year (R. 28). Its purpose was to determine the reaction of Transit customers to radio programs (R. 66), with a view to determining for Transit's own benefit whether the public would like such programs to become a part of Transit's regular service (R. 35, 69). The second survey was made in October, 1949 (R. 69-70), after consultation with the Commission (R. 71). The results of the two surveys were in substantial agreement (R. 69, 70-71); and the Commission found on the basis of the second survey that 93.4% of the Transit-riding public was not opposed to Transit radio programs and that 76.3% were in favor of them (R. 119). Those not in favor of such programs amounted to 6.6% of the people interviewed, but only 3% of those interviewed stated that they would oppose the majority will on the matter (R. 71, 119).[1]

On December 19, 1949, by Order No. 3612, the Commission issued its findings, opinion, and order dismissing its investigation (R. 114-120). In so doing, the Commission, after analyzing the evidence before it in some detail, found and concluded:

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[1] Radio receiving sets have been installed in the vehicles of transit companies in fourteen cities in the United States (R. 40). The favorable reaction in Washington is comparable with favorable public opinion in these other cities (R. 41-42).

"From the testimony of record, the conclusion is inescapable that radio reception in street cars and busses is not an obstacle to safety of operation.

"Further, it is evident that public comfort and convenience is not impaired and that, in fact, through the creation of better will among passengers, it tends to improve conditions under which the public rides.

"In the light of these conclusions, it is obvious that the installation and use of radios in street cars and busses of the Capital Transit Company is not inconsistent with public convenience, comfort and safety." (R. 120.)

No question has been raised by Respondents as to the substantiality of the evidence in support of these findings.

On February 15, 1950, the Commission denied applications for reconsideration filed by the Respondents (R. 121-122).

Pursuant to D.C. Code, Sec. 43-705 (1940 ed.), Respondents appealed to the United States District Court for the District of Columbia from the Commission's Orders (R. 4). Transit, Radio, and the Commission each filed motions to dismiss the appeal (R. 16-18). The District Court granted all of these motions to dismiss, after concluding that "there is no legal right of the petitioners [Respondents] . . . which has been invaded, threatened, or violated by the action of the Public Utilities Commission . . . " (R. 3). The United States Court of Appeals for the District of Columbia Circuit reversed the District Court on the grounds that the broadcasts "deprive objecting passengers of liberty without due process of law" and instructed it to vacate the Commission's order and remand the case to the Commission for further proceedings in conformity with its

opinion (R. 124-131). This Court then granted certiorari to the Petitioners in respect of the Court of Appeals opinion in an order dated October 15, 1951. Although the lower court's opinion is by its own terms limited in application to Transit broadcasts of "commercials" and "announcements" (R. 130), this Court consented also to consider the constitutionality of Transit broadcasts of music alone by granting the Respondents' cross-petition for certiorari in No. 295.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the Respondents' private rights were invaded by the Commission's order dismissing its own investigation into questions of public convenience, comfort and safety;

(2) In failing to hold that the public has no constitutional right to utilize the services of a common carrier;

(3) In holding that the Commission erred as a matter of law:

(a) in failing to find that radio reception on Capital Transit vehicles constitutes unreasonable service;

(b) in finding such reception not inconsistent with public convenience; and

(c) in failing to stop such reception;

(4) In holding that the actions of a privately owned common carrier, operating under governmental authority and subject to governmental regulations, is "governmental action" within the meaning of the Fifth Amendment to the Constitution;

(5) In holding that reception of broadcasts in the vehicles of a privately owned carrier deprive objecting passengers of liberty without due process of law;

(6) In holding that the Government is required by the Fifth Amendment to restrain communication with public conveyances if some passengers object and in failing to hold that the liberties protected by the Fifth Amendment are relative and subject to the adjustment of competing private interests for the benefit of the general public by the legislative and executive branches of the Government acting in accordance with established processes of law;

(7) In holding that the First Amendment does not protect the dissemination of news programs, weather reports, and other announcements important to the convenience and safety of the public and that it does not protect "commercial advertising" where the necessary effect of its elimination would be to terminate the dissemination of news, music, and other information important to the convenience and safety of the public;

(8) In reviewing and vacating the Commission's order on the basis of matters outside of the record certified to it and matters not a part of the evidence of record before the Commission;

(9) In requiring the Commission to conduct further proceedings.

SUMMARY OF ARGUMENT.

1. The Commission did not invade any private rights of the Respondents when it ordered a dismissal of its investigation into the public aspects of Transit broadcasting.

Under the governing statutes, the sole question before the Commission was whether the reception of Radio's broadcasts on Transit's vehicles was inconsistent with public convenience, comfort and safety. This was the only question upon which the Commission had jurisdiction to act. The Respondents have no rights to use the private property of Transit, except as their rights have been defined by statutes and regulations thereunder. Based upon valid findings of fact—findings which neither the court below nor the Respondents have challenged—the Commission concluded that reception of the broadcasts was not inconsistent with public convenience, comfort and safety and, accordingly, dismissed its investigation. In this context it follows that the only question open on a Court review of the Commission's order dismissing its investigation is whether the Commission erred in concluding that such reception was not inconsistent with public convenience, comfort and safety.

The determination of reasonable service to the public is a function delegated by the Congress to the Commission and not to the Courts. The exercise of this function, which involves the reconciliation of conflicting interests of individuals, is essentially a legislative act. The Court of Appeals, ignoring this principle, intruded upon the legislative function of the Commission by erecting, without precedent or authority, a supposed Constitutional bar to the Commission's exercise of that function. And it did so on the basis of supposed private rights that could not properly be considered in the case

before it. Such an unwarranted intrusion on the legislative functions of a regulatory commission by a court runs squarely in the face of the many decisions of this Court condemning such intrusions, and calls for a reversal of the decision of the Court below.

2. The instant case does not present any Fifth Amendment question relating to deprivation of liberty without due process since it lacks the element of governmental action requisite to raising such a question.

The broadcasts of which the Respondents complain result entirely from the acts of Radio and of Transit, both privately owned corporations. Transit is subject to regulation pursuant to certain statutes, but none of these statutes either require or forbid Transit's use of a radio service in its streetcars and buses. Furthermore, the existence of governmental action cannot be derived in this case from any act of the Public Utilities Commission. The Commission was in no way connected with the installation of Transit's radio service, and its finding upon subsequent investigation that Transit broadcasts are not inconsistent with the public convenience, comfort and safety—the only basis upon which it might assume jurisdiction over such broadcasts—is supported by substantial evidence.

3. The Court of Appeals erred in holding that any liberty of the Respondents affected by Transit broadcasting was taken without due process of law.

The Court below failed to recognize the existence in the instant case of interests, including the right to listen, in conflict with those of the Respondents and improperly appropriated to itself the Commission's function of determining on the basis of evidence before it whether Transit's radio service is consistent with

the public convenience, comfort and safety. In determining whether Transit broadcasting is consistent with the public convenience, comfort and safety, the Commission was required to consider the merits of several competing interests involved. These interests were judged according to a reasonable statutory standard and with full respect for the procedural rights of all parties concerned.

4. The Court of Appeals erred in relying on matters not in the record certified to it and so not properly before the Court.

The Court violated applicable statutes in reversing the Commission's order upon the basis of matters not of record before the Commission.

5. The Order of the Commission dismissing its investigation of Transit broadcasting does not infringe unconstitutionally upon any interest which the Respondents may assert under the First Amendment.

The above described objections would be equally as applicable if the Court below had predicated its opinion on the First rather than the Fifth Amendment. Furthermore, the asserted liberty not to listen in public places is in serious conflict with the freedom to communicate, which is one of the principal guarantees of the First Amendment.

ARGUMENT

I

No Private Rights of Respondents were Invaded by the Commission's Order Dismissing its Investigation Into the Public Aspects of Transit Radio.

The District Court's dismissal of the Respondents' appeal from the Commission's Order was based squarely upon the Court's conclusion that "no legal

right of the petitioners [Respondents] . . . has been invaded, threatened, or violated by the action of the Public Utilities Commission . . . " (R. 3). The District Court merely decided that private rights were not invaded by the Commission, which was the only party accountable to the Court in this proceeding. The Court of Appeals seems to have overlooked the fact that the District Court was not called upon to decide whether some person other than the Commission might have invaded the private rights of the Respondents.

Transit's use of radio programs in its street cars and buses has been the subject of much discussion ever since those programs were inaugurated in 1948. Much of this comment has originated with a small group of people opposing such programs who more often than not have directed their objections to the emotions rather than to reason.[2] Frequently, they have drama-

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[2] This group received the vigorous support of some newspapers, many of which may well have been fearful of the competition offered by Transit Radio to their own news and advertising revenues. This point is illustrated with commendable frankness by the following editorial from the Washington Daily News of Friday, October 28, 1949:

"THE BURNING (EARS) ISSUE

The Public Utilities Commission held its first hearing yesterday to find out what the general public thought of radios in street cars.

Practically everybody was there and violently partisan. So we might as well get in the act, too.

Our editorial position on this world-shaking issue is very simple. Thousands of bus and streetcar passengers buy our paper to read on street cars. Radio broadcasts and plugs interfere and compete with readers of printed news and ads. Therefore it interferes with us. Therefore, insofar as it affects us, we're against it.

But the general public is larger than the total News readership, and what the general public wants should prevail.

If the general public's taste has sunk so low that it really wants

tized their argument with distorted pictures of the true nature of Transit broadcasting and then have urged improper remedies to correct the evils which might result if those distortions were accurate. The use of such catch phrases as "captive audience" and "forced listening" with reference to broadcasts which are implied to be unreasonably loud and replete with tasteless advertising and bad music is only one example of this practice. The implications from these phrases and characterizations led the court below to assume, as a basic premise contrary to the evidence of record, that Transit passengers are inevitably forced to listen to Transit Radio whether they want to or not.

Such a description is not in accord with the facts of the case now before this Court. The radio service provided by Transit is unobtrusive in every respect, and the evidence of record and the Commission's findings show that passengers can normally ignore it if they wish to. It is played at a low volume; it consists predominantly of semi-classical music played by string orchestras or muted brass instruments. Interspersed with this music are short newscasts, weather reports, commercial announcements and other public service messages. The commercial announcements, which provide the revenue necessary to support the broadcasts,

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to torture itself with stupid, canned jive and vulgar commercials, why it's a free country.

But if, on the other hand, the intelligent and cultured Washington citizenry prefers quietly and comfortably to read our clever and informed columns in peace, why, who are we to say them nay? Price 3 cents on all newsstands.

If, in so clearly presenting this issue here, you think we've loaded the question, you're right."

are limited by contract to a maximum of six minutes per hour of broadcasting time.

The radio programs originate with Station WWDC in Washington, a station licensed by the Federal Communications Commission. The Communications Act (47 U.S.C., Sec. 151 *et seq.*) has been interpreted by the Federal Communications Commission as imposing upon each licensee the duty of fair presentation of news and controversial issues, the breach of which duty would jeopardize the license for continued operation. *Report on Editorializing by Licensees;* 1 Pike and Fischer R. R. 91:201 (1949). Broadcasting stations under the law, therefore, can not be the personal propaganda instruments of either Government or private persons.

The Public Utilities Commission determined that Transit broadcasting is not inconsistent with the public convenience, comfort and safety, and that it in fact tends to improve the conditions under which the public rides. It therefore issued the order dismissing its investigation of Transit's radio service from which the Respondents took the instant appeal. The substantiality of the evidence of record supporting that order has not been attacked, either by the Respondents or by the Court of Appeals.

Stripped of its emotional overtones, therefore, the principal question before this Court is whether the dismissal of the Commission's investigation into the public aspects of a radio service in Transit's street cars and buses, under applicable statutory standards, invaded the rights of the Respondents, as the Court of Appeals ruled it did. It thus is pertinent to inquire at the threshold into the precise nature of the Respondents' rights as Transit passengers in relation to the Com-

mission's action, on the basis of the evidence of record and the statutory framework guiding such action.

The Respondents have no rights, constitutional or otherwise, to use the private property of Transit as passengers, except as such rights have been defined by the public utility regulatory statutes applicable within the District of Columbia and regulations of the Public Utilities Commission thereunder. D.C. Code, Secs. 43-101 to 43-1007 (1940 ed.). Cf. *Hollis* v. *Kutz*, 255 U.S. 452, 454-455, 41 S. Ct. 371, 372 (1921); *Civil Rights Cases*, 109 U.S. 3, 25, 3 S. Ct. 18, 31 (1883). Acting under the statutory standards governing it (D. C. Code, Secs. 43-208, 43-301 (1940 ed.)) the Commission instituted its investigation into the effect of Transit broadcasting on the public convenience, comfort and safety. Its investigation was necessarily confined to those public questions (R. 28-29) by virtue of the statutory language under which it acted. After determining from all the evidence of record that there was no basis for applying the statutory standards either to prohibit or to limit transit radio, the Commission dismissed its investigation. Under these circumstances the rights of the Respondents on appeal were confined to the opportunity to establish that their interest coincided with the interests of the public. Cf. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-227, 63 S. Ct. 997, 1014 (1943). Thus the Commission's order neither denied any right, imposed any obligation, nor fixed any legal relationship of the Respondents. Its order neither commanded anyone to do anything nor to refrain from doing anything.

The determination of reasonable service requirements from the public's viewpoint is the function of the Commission. The exercise of this function involves the

reconciliation of conflicting interests of the individual members of the public which is essentially a legislative function. *Honolulu Rapid Transit and L. Co.* v. *Hawaii*, 211 U.S. 282, 29 S. Ct. 55 (1908); cf. *Montana-Dakota Co.* v. *Public Service Co.*, 341 U.S. 246, 250-252, 71 S. Ct. 692, 695 (1951). The Court of Appeals ignored the Commission's statutory functions and improperly erected the Constitution as a bar to the exercise thereof. It erred in attributing the acts of Transit to the Commission and, without further discussion, in finding a failure of due process. These unprecedented constitutional concepts were the basis for the Court's intrusion upon the legislative function.

II

The Court of Appeals Erred in Basing Its Decision Upon Constitutional Grounds Within the Fifth Amendment, Since Transit Broadcasts Are Not the Result of Governmental Action.

The possible existence of a liberty under the First or Fifth Amendments such as a freedom not to listen does not of itself vindicate the lower court's decision. It must first be shown that this freedom was taken from the Respondents by the Government and without due process of law. If it was not the Government that deprived the Respondents of their freedom or liberty, that deprivation is not protected by the First or Fifth Amendment, as the lower court held it was. Also, if that freedom or liberty was limited by the Government, but in compliance with the requirements of substantive and procedural due process, the Respondents have again failed to establish the existence of any grievance for which they are entitled to redress.

The very statement of the Court of Appeals holding that "Transit's broadcasts deprive objecting passengers of liberty without due process of law" (R. 130) reveals one of the principal difficulties in reconciling the lower court's opinion with established legal doctrine. Objecting passengers are said to be denied their constitutional rights under the Fifth Amendment by the action of Transit, a private party. The guarantee against deprivation of liberty without due process in the Fifth Amendment is, of course, a limitation only upon the powers of the Government. *Talton* v. *Mayes*, 163 U. S. 376, 16 S. Ct. 986 (1896).

The Court of Appeals found, however, that sufficient governmental action existed to bring the instant case within the Fifth Amendment for the following reasons:

1. Transit has a "franchise" from Congress which gives it a virtual monopoly of public transportation in the District of Columbia; and

2. The District of Columbia Public Utilities Commission "sanctioned" the broadcasts in question when it investigated their use and determined that they are not inconsistent with the public convenience, comfort and safety.

The first of these reasons indicates that the lower court believed that there was governmental action be-

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[3] The court below referred to Section 4 of the Merger Act (D. C. Code, Sec. 44—201 (1940 ed.)) as preventing competition. This section, however, permits competition when the public interest requires it under a standard essentially the same as provided in the familiar provisions of the Interstate Commerce Act, which extend a broad discretionary authority to the Commission in permitting competition. See *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 66 S.Ct. 75 (1945). Another carrier is, in fact, presently authorized to do business in one area of the District (R. 39).

cause the acts of Transit itself constituted such action. The second suggests that the requisite governmental action is to be found in the act of the Public Utilities Commission in conducting an investigation with reference to Transit broadcasts. Both of these conclusions appear to be without support, not only in precedent but in logic. Both lead to an unparalleled extension of the applicability of many of the first ten amendments to the acts of Government-regulated private parties.[4]

A. The acts of Transit itself do not constitute governmental action.

Transit is a privately owned common carrier subject to regulation pursuant to statutory standards only to the extent that its operations involve the public interest. When it installed radio receivers in certain of its streetcars and buses it did so entirely on its own initiative. No Government agency sanctioned the institution of Transit broadcasts, nor did any statute make it necessary that such a sanction be obtained. The acts of Transit, insofar as they relate to broadcasting, are accordingly the lawful acts of a private person and nothing more. They rest on no authority which could characterize them as governmental action.

If Transit radio services do not constitute governmental action *per se*, the only other means of so characterizing them is by describing all the acts of Transit as governmental action. This is the necessary implication from the Court of Appeals' explanation that

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[4] Neither the Court of Appeals nor the Respondents have ever suggested that governmental action can be derived from the part played by Radio in maintaining Transit broadcasts and there appears to be no basis for such a contention. It is therefore not discussed in this brief.

"The forced listening imposed on Transit passengers results from government action" because "Streetcars and buses cannot operate in city streets without a franchise" (R. 127).

The consequences of such a view need hardly be elaborated. The same reasoning which finds governmental action in each act of Transit could also find it in each act of every other common carrier subject to federal regulation, as well as in each act of every business subject to federal wire and radio regulation. Like Transit,[5] rail carriers,[6] motor carriers,[7] air carriers,[8] and persons engaged in communication by wire and radio[9] are regulated by the Federal Government with respect to the public convenience. Each of them operates under a license, certificate of necessity, or other form of governmental authority. The service rendered by each is Government-regulated in varying degrees, and each may be accorded a monopoly position by its regulating agency if that agency finds that the public interest so requires. If the acts of one of these regulated businesses constitute governmental action, so could the acts of all. In holding that constitutional issues are present in the instant case, therefore, the Court of Appeals in substance declared a new rule of law—a rule to the effect that Government-regulated private parties are government instrumentalities whose acts constitute governmental action.

The implications of such a ruling are so far-reaching that never before have any courts even appeared to give

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[5] D.C. Code, Secs. 43-208, 43-301 (1940 ed.).

[6] 49 U.S.C., Secs. 1 (1) (a), 1 (5), 1 (18), 1 (20), 1 (21), 15 (3).

[7] 49 U.S.C., Secs. 301, 304, 306, 307, 316.

[8] 49 U.S.C., Secs. 401, 402, 481, 484.

[9] 47 U.S.C., Secs. 151, 201, 214.

serious consideration to them. In *American Communications Association* v. *Douds*, 339 U. S. 382, 70 S. Ct. 674 (1950), this Court, in fact, took pains expressly to avoid any inference that governmental regulation of itself can transform a private party—in that instance, a labor union—into a Government agency. Sufficient governmental action to raise constitutional issues was derived in that case from Congress' enactment of the Labor-Management Relations Act of 1947. Even while recognizing that the public interest in labor unions, clothed with powers comparable to those possessed by a legislative body is very great, however, the Court stated: "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become government agencies or may be regulated as such." 339 U. S. at 402, 70 S. Ct. at 685.

Even more in point to the instant case is the decision of the United States Court of Appeals for the Third Circuit in *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 151 F. 2d 597 (3rd Cir. 1945), cert. den. 327 U. S. 779, 66 S. Ct. 530 (1946). There a radio station subject to governmental regulation under the Federal Communications Act was held to have the right to terminate its practice of selling radio time to religious organizations, despite a contention that its action operated as a limitation on liberties protected from governmental interference by the First Amendment. The court held that the station was not an instrumentality of the Federal Government, but a privately owned corporation, and that to adopt a contrary view "would be judicial legislation of the most obvious kind". 151 F. 2d at 601. In *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240 (3rd Cir. 1945), the same court dismissed a complaint insofar as it alleged a deprivation of liberty without due process by the Pennsylvania Railroad. Again the reason

given for its action was simply that the railroad was not an agency of the state but a privately owned corporation. A similar result was reached without discussion of the point in *Lundberg* v. *Chicago Great Western Ry. Co.*, 76 F. Supp. 61 (W. D. Missouri 1948).

These few decisions appear to be the only ones which consider the possibility that governmental regulation may subject the acts of private parties to the limitations of the Bill of Rights. Only *American Communications Association* v. *Douds*, 339 U. S. 382, 70 S. Ct. 675 (1950), was cited in connection with the point by the court below, however, and then without discussion of the pertinent statement in that case quoted above. The Court of Appeals did not, in fact, rely directly on any authority for its holding on this issue. It referred only to precedents for the general statement that certain acts of private parties may be governmental in nature and therefore within the guarantees of the first ten amendments.[10] The acts of a privately owned company town [11]

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[10] The cases cited by the Court of Appeals in this connection were: *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 401, 70 S.Ct. 674, 685 (1950); *Marsh* v. *Alabama*, 326 U.S. 501, 506, 66 S.Ct. 276, 278 (1946); *Smith* v. *Allwright*, 321 U.S. 649, 64 S.Ct. 757 (1944); *Civil Rights Cases*, 109 U.S. 3, 17, 3 S. Ct. 18, 25 (1883); and *Rice* v. *Elmore*, 165 F.2d 387, 389 (4th Cir. 1947). While the lower court quoted from the *Civil Rights Cases* opinion in support of this point, it failed to point out the necessary implication in that opinion that the acts of a railroad (a common carrier, like Transit) do not constitute governmental action sufficient to make applicable the Fourteenth Amendment, even though that railroad is subject to state regulation.

[11] *Marsh* v. *Alabama*, 326 U.S. 501, 66 S.Ct. 276 (1946). It is worthy of comment that Mr. Justice Reed, joined by Mr. Chief Justice Stone and Mr. Justice Burton, expressed concern in his dissent to this opinion that the principle expressed therein might be extended beyond the facts of that case. 326 U.S. at 512-513.

or of political parties charged with the conduct of election primaries[12] are not comparable to the acts of Transit, however. This is true for the reason that the activities of Transit are not activities which are inherently governmental in nature. Neither the operation of a transportation system nor the broadcasting of radio programs is fundamentally a governmental function, however much Transit or Radio may be subject to governmental regulation in the performance of those functions. It cannot be said, therefore, that the nature of Transit's activities require that it be regarded as an agency of the Government, as the court below has implied.

There is some indication that the Court of Appeals intended to limit the effect of its ruling that the acts of Transit constitute governmental action by its statement that "Congress has given Transit not only a franchise but a virtual monopoly of the entire local business of mass transportation of passengers in the District of Columbia" (R. 127). The test of whether or not Transit has a monopoly grant is hardly an appropriate one to use in determining the private or governmental character of Transit's acts, however.[13] Applying such a criterion, it could happen that the broadcasting activities of Transit would be termed governmental in character today and that those acts would be adjudicated as improper because encroaching on rights protected by the

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[12] *Smith* v. *Allwright*, 321 U.S. 649, 64 S.Ct. 757 (1944); *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947).

[13] As already noted in footnote 3, the applicable statute (D.C. Code, Sec. 44-201 (1940 ed.)) does not exclude the possibility that a rival transportation company can be licensed to compete with Transit, whenever the public interest so requires. Another carrier is, in fact, presently authorized to do business in one area of the District (R. 39).

Fifth Amendment. Tomorrow, however, if the Commission determined that the public interest dictated the granting of a "franchise" to additional competing transportation companies, the acts of both Transit and its new rivals would be termed private, and the broadcasting that is today banned as unconstitutional would become permissible. Such a distinction has no apparent basis in logic and serves only to confuse the issues involved. A ruling that competing transit companies in one city are to be judged by different standards than are applied to a transit company without competition in another city, for example, could raise serious questions under the equal protection clause of the Fourteenth Amendment.

It is therefore both illogical and impractical to say that a grant of a "monopoly franchise" to a privately-owned Government-regulated business must render that business an instrumentality of Government. It would be equally fallacious to reason that the acts of a private enterprise constitute governmental action because the enterprise is to some degree regulated by Government. One can only conclude, therefore, that its operation subject to governmental regulation in certain respects does not make Transit a governmental instrumentality whose acts are subject to the requirements of the Fifth Amendment.

B. The investigation by the Public Utilities Commission of Transit's radio programs did not constitute those activities governmental action.

The Court of Appeals also held that Transit's radio programs constitute governmental action sufficient to raise questions under the Fifth Amendment because of the Commission's investigation of the public aspects

of that broadcasting and its subsequent determination that such broadcasting is not inconsistent with the public convenience, comfort and safety. This conclusion does not bear analysis.

The lower court reasoned that Transit broadcasting "has been sanctioned by the governmental action of the Commission. If the Commission had found it contrary to public comfort or convenience, or unreasonable, it would have stopped . . ." (R. 127).

The Court of Appeals erred in so holding that the Commission necessarily adopted as its own action the broadcasting practices of a private party which it did not forbid. The Commission's ruling in this matter was not compulsive in character. It did not order or forbid Transit broadcasting. In effect it said no more than that the Commission had no authority to prohibit Transit broadcasts since the evidence clearly showed that such broadcasts are not inconsistent with the public convenience, comfort and safety. The failure of the Commission to prohibit Transit broadcasting can be attributed, therefore, to the failure of Congress to require such a prohibition. No governmental action resulted when the Commission refused to act any more than when Congress refuses to enact requested legislation. The rights or duties of Transit with respect to the furnishing of radio programs in its streetcars and buses were neither greater nor smaller after the Commission dismissed its investigation than they were before that investigation was undertaken.

In holding that the act of the Commission in investigating Transit's radio service constituted governmental action, the lower court in effect ruled that resort to the Commission by the Respondents as intervenors in the Commission's investigation, of itself, created a new right entitling the Respondents to their desired remedy.

When the Respondents appeared before the Commission, they argued that Transit broadcasts deprived them of constitutional rights under the First and Fifth Amendments. This claim was defective because the acts complained of were those of private parties (Transit and Radio) and so were not reached by these Amendments. It was also defective because the rights asserted by the intervening Respondents were private rights not within the scope of the questions raised by the Commission's statutory notice of investigation into public questions. It is now contended, however, that the failure of the Commission to prohibit the acts complained of resulted in such an adoption of those acts by a Government agency as to constitute them governmental action. Out of this circuitous reasoning the Respondents derive their claim that the action of the Public Utilities Commission "sanctioned" Transit's radio programs and so brought them within the guarantees of the Bill of Rights. The inevitable effect of such logic, if accepted, would be to extend the guarantees of many of the first ten Amendments to all parties who seek relief from a Government agency, whether those parties arrive at the agency doors already clothed with such rights or not.[14]

The Fifth Amendment forbids the Federal Government from depriving any person of liberty without due process of law. It does not require the Government to act wherever one private party may be infringing upon

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[14] The Respondents' argument that their intervention in the Commission's investigation clothed their grievance against Transit and Radio with constitutional overtones is somewhat analogous to the equally fallacious argument that an intervenor in a proceeding can enlarge or alter the issues involved in the proceeding. Cf. *Vinson* v. *Washington Gas Light Co.*, 321 U.S. 489, 498, 64 S.Ct. 731, 735 (1944).

the liberty of another. It was precisely for this reason that in *United States* v. *Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876), this Court refused to uphold the conviction of a private party who had been accused of abusing another's right under the Second Amendment to bear arms. The Court there stated:

> "The second amendment declares that it [the right to bear arms] shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government. . . ." (92 U.S. at 553, 23 L. Ed. at 591-592)

In reaching its conclusion on the evidence of record that its investigation should be dismissed, the Commission did not sanction the invasion of a constitutional right by Transit any more than this Court sanctioned Cruikshank's invasion of another's right to bear arms by refusing to affirm Cruikshank's conviction under the Second Amendment. *United States* v. *Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 (1876). As in the case of Cruikshank, Transit's acts are the acts of a private party and are not subject to the restrictions of the Bill of Rights. Transit has not sought (nor does it require) any action by the Commission in aid of its radio programs. Its exercise of the right to have radio programs on its vehicles is not dependent upon any sanction from the Commission or any other Government instrumentality. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1, 13-14, 68 S. Ct. 836, 842 (1948).

In summary, the lower court's holding that there was sufficient governmental action present in the instant case to justify a consideration of constitutional ques-

tions under the Fifth Amendment was entirely unwarranted. The conduct of neither Transit nor the Commission supports such a conclusion, and if the Government does not act through either one of these organizations separately it cannot be said to act through both together. The Court of Appeals ruling that Transit's radio programs are supported by governmental action is therefore in error.

Since Transit broadcasting does not infringe any constitutional rights of the Respondents, and since that broadcasting has with good reason been found by the Public Utilities Commission not to be inconsistent with the public convenience, comfort and safety, the proper recourse for the Respondents in alleviating any grievance they may believe they suffer because of it lies not with the courts but with Congress. The Respondents have always had a right to seek enactment of legislation limiting or prohibiting broadcasting in public conveyances in the District of Columbia.[15] Their failure to secure such legislation would mean only that in this matter they are among a minority who must accept the existing situation resulting from their acquiescence in the will of the majority. This is true at some time of every person enjoying the privileges of democratic government.

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[15] Any such statutory enactment would, of course, be subject to such constitutional limitations as might be applicable.

III

The Court of Appeals Erred in Holding That Any Liberty of the Respondents Affected by Transit Broadcasting Was Taken Without Due Process of Law.[16]

The function of constitutional government is not so much the unqualified protection of the individual's liberty to do as he pleases as it is a reasonable reconciliation of the inevitable conflicts which must arise among individuals in the exercise of their liberty. No two persons have identical likes and dislikes, and the satisfaction of one person's desires must frequently mean the obstruction of another's. It is a rare occasion indeed when an Act of Congress, an order of an administrative agency, or a judgment of a court does not restrict the liberty of some in fostering other interests considered more important to the general welfare. Not even the fundamental freedoms protected by the Bill of Rights are absolute (*Kovacs* v. *Cooper*, 336 U.S. 77, 69 S. Ct. 448 (1949)), and the value of each one of those freedoms in a given set of circumstances must be weighed against the value of other freedoms with which they conflict.

The Fifth Amendment guarantee of liberty as well as the guarantee under the First Amendment, therefore, are necessarily qualified ones. The Fifth Amendment does not state that no man shall be deprived of his liberty, but rather that no man shall be deprived of his liberty without due process of law. Due process "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall

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[16] Throughout this Point the Petitioners assume *arguendo* that the facts of the instant case establish sufficient governmental action to justify further consideration of the applicability of the Bill of Rights. See Point II of this brief to the contrary.

have a real and substantial relation to the object sought to be obtained." *Nebbia* v. *New York*, 291 U.S. 502, 525, 54 S. Ct. 505, 510-511 (1934). So long as competing interests are adjusted and limited in accordance with the requirements of due process, the guarantee of the Fifth Amendment has been satisfied.

In the instant case, if there were any limitation placed upon the Respondents' liberty by the Government in favor of Transit broadcasting, it resulted from a careful assessment of the public interests involved within the framework of the Commission's statutory powers. That assessment was made in full compliance with the requirements of due process. The court below erred, therefore, in holding that the Respondents have been deprived of liberty without due process of law.

A. The Court of Appeals failed to recognize the presence of competing interests in the instant case which are opposed to such interests as the Respondents may assert.

The precise reasoning behind the Court of Appeals' determination that there is a freedom not to listen which deserves protection in the instant case is not apparent. The court's opinion indicates that this interest must prevail because there are no competing interests involved. It seems clear, however, that such is not the case. Wherever the Respondents can assert a freedom not to listen to Transit broadcasts, there is surely, at the least, a corresponding affirmative freedom *to* listen to such broadcasts which can be asserted by the far greater number of Transit passengers who enjoy those broadcasts.[17] The latter freedom is con-

[17] Two surveys in which trained investigators used recognized scientific random sampling methods were made to test public

cerned with the liberty to use one's faculties as he desires fully as much as is the former. Furthermore, the freedom to listen, unlike any freedom not to listen, is a necessary element of the freedom to communicate and so is protected by the First Amendment guarantees of free speech and a free press. *Cf. Martin* v. *City of Struthers,* 319 U.S. 141, 143, 63 S. Ct. 862, 863 (1943). The court below failed even to discuss the freedom to listen, however, when it held that its newly-recognized freedom not to listen must prevail under the facts of the instant case.

There are other interests at stake in the instant case which the Court of Appeals also did not consider. There is, for example, a very considerable interest of Transit under the Fifth Amendment in not being deprived of the liberty to use its property and to contract in accordance with the best judgment of its management, subject to such public limitations as may be imposed upon it by statute. Perhaps the most disturbing instance of the lower court's failure to recognize the presence of competing interests, however, is its apparent holding that Transit and Radio can assert no First Amendment interest in freedom of speech and press in opposition to the claims of the Respondents. There seems to be no doubt that radio is entitled to the protection of that

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reaction to Transit broadcasting. The second of these was made after consultation with the Public Utilities Commission. It disclosed that more than 75% of the Transit-riding public favored Transit broadcasts (R. 70), while approximately 6.6% opposed such broadcasts (although only 3% stated they would oppose the majority will on the matter) (R. 71). These results are similar to those obtained from the first survey, which was conducted before the Commission instituted its investigation (R. 66, 69). They also resemble the samplings taken in other cities in the country on the same subject (R. 41-42).

Amendment,[18] especially where it is performing the important function of broadcasting information in the nature of factual news reports. Furthermore, this protection extends even to speech aimed not necessarily at the distribution of information but rather at entertainment, *Winters* v. *New York*, 333 U.S. 507, 510, 68 S. Ct. 665, 667 (1947), and in many instances it extends to material used in business or economic activity, *Thomas* v. *Collins*, 323 U.S. 516, 531, 65 S. Ct. 315, 323 (1945). Once such an interest in freedom of speech and press has been established, only the existence of a substantial, serious evil resulting from its exercise will normally justify a restriction upon it. *Bridges* v. *California*, 314 U.S. 252, 262-263, 62 S. Ct. 190, 193-194 (1941).

The Court of Appeals dismissed the contention that there are First Amendment freedoms of the Petitioners in conflict with the Respondents' interests in the instant case. It held that "the public interest in freedom from forced listening outweighs the private interest in making more effective, by amplifying a communication not protected by the First Amendment. The Amendment does not protect commercial advertising [citing *Valentine* v. *Chrestensen*, 316 U.S. 52, 62 S. Ct. 920 (1942)]" (R. 129). The *Valentine* decision did no more, however, than uphold as constitutional a statute of New York State in which the distribution of commercial and business advertising matter on public thoroughfares was forbidden. It was apparent from the facts of the case that there was no *bona fide* attempt by the advertiser to distribute non-commercial information and the Court took care to stress this point in its opinion. 316 U.S. at 55, 62 S. Ct. at 921-922. The decision is there-

[18] Cf. *United States* v. *Paramount Pictures*, 334 U.S. 131, 166, 68 S.Ct. 915, 933 (1948).

fore inapplicable to the instant case, where not only the right to broadcast advertisements but the right to broadcast news reports, weather forecasts, and other non-commercial public service announcements is in issue.[19] Furthermore, the scope of the *Valentine* decision has since been clarified by this Court's ruling in *Jamison* v. *Texas*, 318 U.S. 413, 63 S. Ct. 669 (1943), that the mere presence of advertising matter on a handbill containing other matter as well cannot subject distribution of the handbill to prohibition.

It therefore appears that the true statement of the law is not that the First Amendment does not protect commercial advertising, as the Court of Appeals concluded, but that a legislature may in the exercise of its legitimate police power limit the distribution of any communication containing no *bona fide* message other than advertising. There is no such statute applicable in the instant case, and the content of the broadcasts in issue cannot in any event be described as of a predominantly commercial nature. The advertising messages in Radio's broadcast schedule occupy no more than six minutes per hour of broadcast time. They are a necessary adjunct of the broadcasting of music, news reports, and weather forecasts and other public service announcements, for they provide the revenue necessary to support those additional activities. The need for

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[19] The court refrained from ruling "whether occasional broadcasts of music alone would infringe constitutional rights" (R. 130), although the original appeal from the order of the Public Utilities Commission to the District Court complained in general terms of Transit's broadcasts. It should be noted, however, that the lower court's decision acts as a bar to non-commercial announcements and even to broadcasts of music alone as a practical matter, since the radio advertising banned by the court provides the revenue necessary to support such broadcasts.

radio and newspaper advertising to support their respective media has long been recognized. Where governmental action has the effect of restricting means of communication by affecting advertising revenues grave constitutional questions are raised by that action. Cf. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 56 S. Ct. 444 (1936). A prohibition of Transit radio advertising by the Commission would raise such questions in the instant case.

It is not true, therefore, that there were no constitutional interests in issue before the court below which could prove more deserving of protection than the newly recognized Fifth Amendment freedom not to listen upon which the court predicated its decision. At least on a par with that freedom is the freedom to listen which can be asserted by those passengers who enjoy Transit broadcasts, a freedom which is grounded on the First as well as the Fifth Amendment. There is also on Transit's part a liberty under the Fifth Amendment to improve its service with radio programs and to use its property according to its own best judgment, subject always to requirements of the public interest as defined by statute. Finally, on the part of Transit and Radio together there is the additional First Amendment freedom to inform and entertain Transit patrons by means of broadcasts in the public interest.

B. The interest of the public in the instant case was properly resolved by the Commission according to applicable legislative standards and in compliance with due process of law and the Court of Appeals committed error in substituting its judgment for that of the Commission.

Whenever a circumstance arises in which two or more liberties come in conflict with one another, the task of

resolving that conflict rests fundamentally with the legislature and not with the courts. Mr. Justice Frankfurter aptly stated both the problem and the necessary answer to it in his concurring opinion in *Dennis* v. *United States*, 341 U.S. 494, 71 S. Ct. 857 (1951):

> "But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. . . . History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
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> "Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. . . . We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it." 341 U. S. at 525, 71 S. Ct. at 875.

This conclusion is one to which the Court has adhered throughout the numerous civil rights cases in recent years. E.g., *Thomas* v. *Collins*, 323 U.S. 516, 531, 65 S. Ct. 315, 323 (1945); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54, 62 S. Ct. 920, 921 (1942).

In the instant case, the legislative judgment as to the best interest of the public is reflected ultimately in the action of the Public Utilities Commission in dismissing its investigation of Transit broadcasting. That

investigation was made pursuant to statutory provisions which assured the Respondents as members of the public of both substantive and procedural due process. Congress has directed the Commission to insure that Transit provides service in the public convenience, comfort and safety. D.C. Code, Secs. 43-208, 43-301 (1940 ed.). It has also prescribed the manner in which the Commission may exercise this authority. D.C. Code, Secs. 43-408 to 43-411 (1940 ed.). It was pursuant to these statutes that the Commission acted in the instant case. No contention has ever been made that the applicable statutory provisions are unconstitutional, and an examination of the Commission's conduct in the instant case demonstrates its full compliance with such provisions. A formal investigation was held on the Commission's own motion relating to the public convenience, comfort and safety of Transit broadcasting, and the requisite statutory notice of this investigation, together with an opportunity to present evidence and testimony was afforded all interested parties. Only one of the Respondents testified. In all only two users of Transit service testified as to their objection to the radio broadcasts.

It is apparent from the foregoing that the Respondents were not deprived of any liberty by the Commission without due process. The public convenience, comfort and safety is an entirely reasonable standard by which to determine which of two or more conflicting interests should prevail, and the Commission afforded the Respondents a complete and impartial hearing in applying that standard.

Without challenging either the statute under which the Commission acted or the sufficiency of the evidence supporting the Commission's order dismissing its investigation of Transit broadcasting, the Court of Ap-

peals nevertheless reversed that order. In doing this it employed the following reasoning:

> "In our opinion Transit's broadcasts deprive objecting passengers of liberty without due process of law. Service that violates constitutional rights is not reasonable service. It follows that the Commission erred as a matter of law in finding that Transit's broadcasts are not inconsistent with public convenience, in failing to find that they are unreasonable, and in failing to stop them." (R. 130).

Such an argument begs the very issue the court undertook to decide.

There can be a failure of due process only if the legislative restriction of a liberty is arbitrary or unreasonable. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S. Ct. 736, 743 (1942); cf. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 63 S. Ct. 997 (1943). It therefore serves no purpose to say as the court did that the legislative restriction of a liberty is unreasonable because there was a failure of due process.

The Respondents did not appear before the court below armed with any constitutional right, contrary to the court's assumption. As the court itself recognized in its opinion (R. 129), the freedom not to listen is not absolute. It conceivably can be restricted in favor of conflicting constitutional interests if due process of law is observed in imposing that restriction. The question before the court below, therefore, was not only whether the Respondent's freedom had been restricted, but whether the alleged restriction had been imposed in accordance with due process. This latter question the court did not answer. If there is a freedom not to listen which was restricted in this case, as a matter of

law that restriction was imposed in accordance with due process. It was made according to a reasonable standard prescribed by Congress and with careful observance of all claims of the Respondents to procedural due process.

The Court of Appeals has ruled in effect that Respondents' alleged freedom not to listen cannot be limited even by due process. It has not merely said that Congress may, in the exercise of its police power, favor the freedom not to listen over other freedoms. Cf. *Saia* v. *New York*, 334 U.S 558, 68 S. Ct. 1148 (1948); *Thomas* v. *Collins*, 323 U.S. 516, 65 S. Ct. 315 (1945); *Valentine* v. *Chrestensen*, 316 U.S. 52, 62 S. Ct. 920 (1942). No such police power has ever been exercised. The court's actual ruling is that Congress and the Public Utilities Commission *must* restrict other constitutional interests and the public interest in favor of the freedom not to listen. While it may have rejected the principle in so many words, therefore, the court below has come remarkably close to holding that there is such a thing as an absolute right—a right on the part of an individual to keep others from talking in public places.

This distinction between what Congress may do in the legitimate exercise of its police power over the District of Columbia and what Congress must do as a matter of constitutional law seems not to have occurred to the lower court. It stated, for instance, that "Both the decision and the opinions in *Kovacs* v. *Cooper*, 336 U.S. 77, give great weight to the public interest in freedom from forced listening" (R. 128). However, the Court held in that case only that a city may enact an ordinance forbidding the use of loud and raucous sound trucks on city thoroughfares. There is no implication in the opinion that a city must forbid the use of

such trucks. It does not, therefore, justify any conclusion that the Public Utilities Commission must ban Transit's broadcasts in the absence of any legislative act requiring such a prohibition. The dangers of restricting civil liberties without proper statutory safeguards—indeed, without benefit of any statute at all—have long been recognized by the courts and do not require further elaboration here. Cf. *Niemotko* v. *Maryland*, 340 U. S. 268, 71 S. Ct. 325 (1951); *Kunz* v. *New York*, 340 U.S. 290, 71 S. Ct. 312 (1951); *Saia* v. *New York*, 334 U.S. 558, 68 S. Ct. 1148 (1948).

The lower court nevertheless failed to recognize this need for legislative guidance in adjusting competing interests. Instead of regarding the Bill of Rights as a limitation on governmental interference with civil liberties, it has, in effect, interpreted the Fifth Amendment as a mandate on Government to restrict those liberties whenever their exercise becomes the least bit annoying. The court has done this by creating a negative freedom—a freedom not to listen. This amounts to little less than a freedom not to be bothered. Such a freedom, the Court of Appeals has ruled, prevails even over the vital First Amendment freedoms which until now have repeatedly been recognized as occupying a preferred position in the balancing of constitutional interests. *Saia* v. *New York*, 334 U.S. 558, 562, 68 S. Ct. 1148, 1151 (1948); *Marsh* v. *Alabama*, 326 U.S. 501, 509, 66 S. Ct. 276, 280 (1946); *Thomas* v. *Collins*, 323 U.S. 516, 529-530, 65 S. Ct. 315, 322 (1945).

As it has been interpreted by the Court of Appeals, therefore, the freedom not to listen has in it the seed of destruction for a great many of our established civil liberties. The Court of Appeals held that since the individual needs to use streetcars and buses he cannot be exposed to broadcasts (however reasonable) while satis-

fying that need. By the same token, it would seem that the individual exercising his right to enjoy a public park or the privacy of his home could also insist on this right to silence (assuming that the activity which he finds annoying is in some measure supported by governmental action). The politician with a Government permit to speak in the park and the evangelist with a Government license to solicit from door to door could therefore no longer "bother" the unwilling listener, however reasonable their activities might be.[20] Furthermore, the Court of Appeals has held that the remedy of such a dissenting listener is not dependent upon any statute but is available by simple resort to judicial process. The result of the court's decision, therefore, is to place in the hands of a dissident individual a veto power which could seriously threaten the free exercise of even the most precious of our civil liberties. It has given to the minority an almost uncontrolled discretion to sacrifice the welfare of the public to its own imagined comfort and convenience. It is not the private convenience of the few with which Congress, the Commission, and the courts must concern themselves, but the greater convenience of the public as a whole.

The Court of Appeals therefore committed error in ruling that the newly announced freedom not to listen

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[20] If it is objected that the issuance of a Government permit to speak in a park or a Government license to solicit from door to door (in the District of Columbia) does not constitute sufficient governmental action to raise constitutional questions under the First and Fifth Amendments, it should also be noted that not even this much support for a finding of governmental action is present in the instant case. Transit's broadcasting program has been carried on without the need for or the issuance of any Government permit authorizing such a program. See Point II of this brief.

must prevail over the very considerable competing constitutional rights and the interest of the public which are also present in the instant case. The order of the Commission which the court below reversed should have been affirmed because it was reached in compliance with the requirements of procedural due process and in accordance with a reasonable standard prescribed by Congress. That order was neither unreasonable nor arbitrary. Its reversal by the Court of Appeals therefore constituted judicial legislation beyond the scope of the court's authority.

IV

The Court of Appeals Erred in Reversing the Commission's Order of Dismissal on the Basis of Evidence Not of Record Before the Commission or Not Certified to the Court.

While the Court of Appeals did not hold that the Commission's findings of fact are not supported by substantial evidence of record, its opinion nevertheless relies heavily on the emotional overtones inherent in this case by reference to and assumptions based on matters outside the record which reflect on the validity of the Commission's findings. In referring to such material the court not only exceeded its power of review over orders of the Commission but also made several mistakes of fact.

Section 43-705 of the District of Columbia Code (1940 ed.) provides for review of orders of the Commission by the District Court and thereafter by the Court of Appeals and the Supreme Court. The section specifically requires that any such appeal to the District Court "shall be heard upon the record before the Commission, and no new additional evidence shall be re-

ceived by the said court." Such a statute precludes review and reversal of a Commission order on the basis of allegations in a Petition of Appeal not supported by the record. The reliance by the Court of Appeals on such allegations, as well as on supposed admissions by Radio and Transit (R. 126), constitutes a violation of Section 43-705.

In Section 43-706 of the Code it is provided that an appeal from a Commission order shall be limited to questions of law and that "the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious." There is no reason to believe that these limitations on the scope of review are not equally as binding on the Court of Appeals as on the District Court.

Despite these limitations, however, the Court of Appeals went outside the record in the following instances:

1. In challenging (without overruling) the Commission's finding that Transit's broadcasts are favored by a great majority of its passengers, the court referred to an unofficial ballot poll on the subject conducted by a newspaper (R. 130). This poll was described by the court as an "unbiased inquiry which did not claim to be scientific." It was not a poll, however, that was ever presented to the Commission prior to issuance of the order dismissing the Commission's investigation, nor was it ever admitted in evidence by that body. It should not, therefore, have been considered by the Court of Appeals.

The poll is without validity in any event, since its results were controlled only by the capacity of a few persons to purchase newspapers containing the printed ballots with which they voted. Those results are, there-

fore, no more unbiased than they are scientific. The lower court chose to give some prominence to this poll in its opinion, however, in spite of very substantial uncontradicted evidence in the record to the effect that the public as a whole does favor the radio service provided by Transit in its streetcars and buses (R. 35, 38, 41, 42, 69-71).

2. As a basic premise the lower court also stated that "forced listening" was "well known" and "proved by many witnesses" (R. 126), and that "the record makes it plain that the loss [of freedom of attention] is a serious injury to many passengers." (R. 129) The Petitioners do not know of any evidence of record, however, either before the Commission or before the Court of Appeals, which supports such conclusions. Only two Transit rider witnesses testified against Transit's radio programs during the Commission's investigation (Transcript of orignal record before the Commission, pp. 488, 495). One of these witnesses denied the premise of "forced listening", and neither of them spoke of any injury occasioned by such programs. Both testified only to a dislike of Transit broadcasting. This testimony can be contrasted with the evidence before the Commission (R. 91-93) and with the Commission's finding (R. 119-120) indicating that there is no such thing as an "unavertible sense of hearing." It can be contrasted also with the evidence before the Commission (R. 69-71) and with the Commission's finding (R. 119) to the effect that a great majority of Transit's passengers favor radio service in buses and streetcars.

3. The lower court in footnotes 3 and 5 of its decision (R. 126) referred to matters from an affidavit attached to the Respondents' supplementary application to the Commission for reconsideration. This affidavit should

not have been considered by the court, since it was never admitted in evidence by the Commission. The Respondents had ample opportunity to present any such evidence that may have been relevant at the original hearing before the Commission. They chose not to do so but withheld their offers until their application for reconsideration. Under such circumstances, the consideration of such affidavits deprived the other parties before the Commission of any opportunity for cross-examination or rebuttal thereon and the denial of reconsideration by the Commission was not arbitrary. Cf. *St. Josephs Stockyards Co.* v. *United States,* 298 U.S. 38, 53-54, 56 S. Ct. 720, 726-727 (1936); *United States* v. *Northern Pacific Ry. Co.,* 288 U.S. 490, 494, 53 S. Ct. 406, 407 (1933); *Manufacturer's Ry. Co.* v. *United States,* 246 U.S. 457, 489-490, 38 S. Ct. 383, 392 (1918).

4. On still another occasion, a reference by the Court of Appeals to matters outside the record certified to it led the Court to make a statement which is contrary to fact. The Court quoted the Chairman of the Commission as observing that "The decision of the Commission will be made on the numbers of those saying 'I like it' and those saying 'I dislike it'" (R. 129, footnote 15). This quotation implies that the Commission determined that Transit's radio programs are in the public interest on the basis of a majority vote rather than on the basis of evidence before it. It is apparently derived from page 336 of the transcript of the original record before the Commission, a page which was not certified to the Court of Appeals.[21]

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[21] The consideration of matters not certified to the Court of Appeals by the District Court violates Rule 75(g) of the Federal Rules of Civil Procedure. A Court of Appeals can act only on the facts officially appearing before it and cannot take judicial

The error of the Court in its reliance on matters not included in the record is emphasized by its failure to state that matter accurately. The Court failed to note that the original text of the quotation had been officially corrected by the Commission. It properly should read:

> "Chairman Flanagan: The decision of the Commission *will not* be made on the number of those saying 'I like it' and those saying 'I dislike it.'" (Emphasis supplied.)

In going outside the record certified to it, therefore, the Court of Appeals attributed to the Chairman of the Commission an intent contrary to his actual statement. The inference which the Court apparently drew from that quotation is accordingly unwarranted.

For the reasons above stated, therefore, the Court of Appeals committed error in reviewing and vacating the Commission's order on the basis of material not appearing in the record before the Commission. Since it must be presumed that the Court used this material for a definite purpose in explaining the rationale of its decision, it cannot be presumed that its error in this regard is without significance.

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notice of the records of subordinate Courts within its jurisdiction. *White* v. *Central Dispensary and Emergency Hospital*, 69 App. D.C. 122, 99 F.2d 355 (1938); *Divide Cr. Irr. District* v. *Hollingsworth*, 72 F.2d 859 (10th Cir. 1934).

V

The Order of the Commission Dismissing Its Investigation of Transit Broadcasting Does Not Infringe Unconstitutionally Upon Any Interest Which the Respondents May Assert Under the First Amendment.

The court below held only that Transit broadcasting is in contravention of rights of the Respondents existing under the Fifth Amendment. The Respondents argued before that court, however, that they were also entitled to protection against Transit broadcasting because it infringed upon interests which they asserted under the First Amendment. This claim is being presented to this Court in a cross-petition (No. 295) in the instant case. Although the Petitioners may find it necessary to answer this argument more fully in an answer brief to the cross-petition, they include in this brief for the convenience of the Court the following outline with respect to their position regarding the Respondents' claims under the First Amendment.

The basic premise of the Respondents with respect to their claims under the First Amendment has been that Transit broadcasting violates their freedom of speech. The Respondents argue that freedom to speak means a freedom to listen and that a freedom to listen implies a freedom not to listen.

The Petitioners challenge this argument on several grounds:

(1) Since the Commission's order dismissing its investigation determined only that Transit broadcasting is not inconsistent with the public convenience, comfort and safety, the only standards under which the Commission is authorized to regulate Transit, its order did not invade any private rights of the Respondents. (For the substance of this argument, the Court is re-

spectfully referred to the argument made by the Petitioners in Point I of the instant brief.)

(2) Freedom of speech as used in the First Amendment is actually a freedom to communicate. For this reason it includes a freedom to listen as well as a freedom to speak. Cf. *Martin* v. *City of Struthers*, 319 U. S. 141, 143, 63 S. Ct. 862, 863 (1943). The freedom to communicate is not dependent in any manner, however, upon a freedom not to listen, a freedom which if it existed would serve very effectively to negate all the rights arising out of the freedom to communicate. A freedom not to listen cannot therefore logically be derived from the First Amendment freedom to communicate (or, more properly, freedom of speech).

(3) The facts of the instant case do not establish sufficient governmental action to support the Respondents' contention that any of their interests under the First Amendment are affected by Transit broadcasting. (For the substance of this argument, the Court is respectfully referred to the argument made by the Petitioners in Point II of the instant brief, to the effect that the facts of the instant case do not present sufficient governmental action to support application of the Fifth Amendment to them.)

(4) If any First Amendment freedoms of the Respondents were limited by the order of the Commission dismissing its investigation of Transit broadcasting, those freedoms were limited in accordance with due process of law. Not even First Amendment freedoms are absolute in character, *Dennis* v. *United States*, 341 U. S. 494, 503, 71 S. Ct. 857, 864 (1950); *Kovacs* v. *Cooper*, 336 U. S. 77, 85, 69 S. Ct. 448, 453 (1949), and

the Commission properly found after an investigation that competing interests were more deserving of protection in the instant case than those of the Respondents. This was particularly proper when the recognition of the Respondents' freedom not to listen would restrict not only Fifth Amendment liberties of others but would also infringe upon the First Amendment freedom to communicate. That investigation was conducted in accordance with the requirements of procedural due process and the findings resulting from it were made in accordance with a reasonable standard prescribed by Congress—the public convenience, comfort and safety. It was error for the Court of Appeals to reverse an order of the Commission lawfully made in compliance with this legislative standard. (For a more detailed exposition of this argument the Court is respectfully referred to Point III of the instant brief, in which the Petitioners have contended that the Respondents were not deprived of liberty without due process under the Fifth Amendment by Transit broadcasting.)

CONCLUSION.

The decision of the court below is, for the reasons shown above, erroneous and should be reversed.

Respectfully submitted,

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APPENDIX.

Federal Constitution.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES.

D. C. CODE (1940 ed.):-

Sec. 43-208. Orders as to repairs—Improvement in equipment, service.

Whenever the commission shall be of opinion, after hearing had upon its own motion or upon complaint, that repairs, improvements, or changes in any street railroad, gas plant, electric plant, telephone line, telegraph line, pipe line, water-power plant, or the facilities of any common carrier ought reasonably to be made,

or that any addition of service or equipment ought reasonably to be made thereto, or that the vehicles or cars of any street railroad or common carrier are unclean, insanitary, uncomfortable, inconvenient, or improperly equipped, operated, or maintained, or are in need of paint, or unsightly in appearance, or that any addition ought reasonably to be made thereto, in order to promote the comfort or convenience of the public or employees, or in order to secure adequate service or facilities, the commission shall have power to make and serve an order directing that such repairs, improvements, changes, or additions to service or equipment be made within a reasonable time and in a manner to be specified therein, and every such public utility is hereby required and directed to obey every such order of the commission. (Mar. 4, 1913, 37 Stat. 995, Ch. 150, Sec. 8, par. 96.)

Sec. 43-301. Public utilities—Service and facilities—Charges to be reasonable, just, and nondiscriminatory—To obey orders of commission.

Every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facilities or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just, and non-discriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by chapters 1-10 of this title. (Mar. 4, 1913, 37 Stat. 977, ch. 150, Sec. 8, par. 2.)

Sec. 43-408. Commission may investigate unjust, discriminatory rates—No order to be entered without formal hearing.

Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, charges, or schedules, or services, or time and conditions of payment, or any joint rate or rates, schedules, or services, are in any respect unreasonable or unjustly discriminatory, or that any time schedule, regulation, or act whatsoever affecting or relating to the conduct of any street railway or common carrier, or the production, transmission, delivery, or furnishing of heat, light, water, or power, or any service in connection therewith, or the conveyance of any telegraph or telephone message, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the commission without a formal hearing. (Mar. 4, 1913, 37 Stat. 983, ch. 150, Sec. 8, par. 38.)

Sec. 43-409. Commission to notify utility of complaints.

The commission shall prior to such formal hearing notify the public utility complained of that a complaint has been made, and ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinafter provided. (Mar. 4, 1913, 37 Stat. 983, ch. 150, Sec. 8, par. 39.)

Sec. 43-410. Notice as to hearings—Compulsory attendance of witnesses.

The commission shall give the public utility and the complainant, if any, ten days' notice of the time and place when and where such hearing and investigation will be held and such matters considered and determined. Both the public utility and complainant shall be entitled to be heard and shall have process to enforce the attendance of witnesses. (Mar. 4, 1913, 37 Stat. 983, ch. 150, Sec. 8, par. 40.)

Sec. 43-411. Reasonable rates may be ordered—Notice to be given utility affected thereby.

If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of chapters 1-10 of this title, the commission shall have power to determine and by order fix and order to be substituted therefor such rate or rates, tolls, charges, or schedules as shall be just and reasonable * * *. (Mar. 4, 1913, 37 Stat. 983, ch. 150, Sec. 8, par. 41.)

Section 43-415. Hearings after summary investigation.

If after making such investigation the commission becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation. Ten days after such notice has been given the commission may proceed to set a time and place for a hearing and an investigation as hereinbefore provided. (Mar. 4, 1913, 37 Stat. 984, ch. 150, Sec. 8, par. 45.)

Section 43-705. Appeal to District Court from certain orders—Precedence over other civil causes—Proceeding when additional evidence proper—Statement to accompany decision—Subsequent appeals—Commission not liable for costs or damages.

The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District Court of the United States for the District of Columbia a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: *Provided*, That the parties, with the consent and approval of the Commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plea. Thereupon the appeal shall be at issue and ready

for hearing. All such proceedings shall have precedence over any civil cause of a different nature pending in said court, and the District Court of the United States for the District of Columbia shall always be deemed open for the hearing thereof. Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Said Commission shall not, nor shall any of its members, officers, agents, or employees, be taxed with any costs, nor shall they or any of them be required to give any supersedeas bond or security for costs or damages on any appeal whatsoever. Said Commission, or any of its members, officers, agents, or employees, shall not be liable to suit or action or for any judgment or decree for any damages, loss, or injury claimed by any public utility or person, nor required in any case to make any deposit for costs or pay for any service to the clerks of any court or to the marshal of the United States. (Mar. 4, 1913, 37 Stat. 989, ch. 150, sec. 8, par. 65; Aug. 27, 1935, 49 Stat. 882, ch. 742, sec. 2.)

Section 43-706. Appeal limited to questions of law.

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious. (Mar. 4, 1913, 37 Stat. 989, ch. 150, sec. 8, par. 66; Aug. 27, 1935, 49 Stat. 883, ch. 742, sec. 2.)

Section 44-201. Competing lines—Certificates of convenience and necessity.

No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Utilities Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public. (Jan. 14, 1933, 47 Stat. 760, ch. 10, sec. 4.)

RULES

Rule 75(g), Federal Rules of Civil Procedure. Record on Appeal to a Court of Appeals.

Record to be Prepared by Clerk—Necessary Parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court, a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification. (As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.)

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